

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)
	)
Petitioner	)
	) MC No. 06-10427
-VS-	) MC No. 06-10449
	) MC No. 06-10439
JEFFREY SHIELDS, CHARLES PEAVY,	) Pages 1 - 39
JOEL WETMORE,	)
	)
Respondents	)

## STATUS CONFERENCE

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts 02210  
October 18, 2007, 9:15 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617) 345-6787

1 A P P E A R A N C E S:

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3 Assistant United States Attorneys, Office of the United  
4 States Attorney, 1 Courthouse Way, Boston, Massachusetts,  
02210, for the Petitioner.

5 PAGE KELLEY, ESQ. and WILLIAM FICK, ESQ.,  
6 Federal Defender Office, 408 Atlantic Avenue, Boston,  
Massachusetts, 02210, for the Respondents.

7 ERIC TENNEN, ESQ., Swomley & Associates,  
8 227 Lewis Wharf, Boston, Massachusetts, 02110-3927,  
9 for the Respondents.

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## PROCEDING S

THE CLERK: The case of the United States V.

Jeffrey Shields, Miscellaneous Case No. 06-10427, United States V. Charles Peavy, Miscellaneous Action No. 06-10449, and United States J. Joel Wetmore, Miscellaneous No. 06-10439, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. QUINLIVAN: Good morning, your Honor. Mark Quinlivan for the United States.

MR. FARQUHAR: Good morning, your Honor. Ray Farquhar for the United States.

MS. KELLEY: Good morning. Page Kelley. I represent Mr. Shields.

MR. FICK: Good morning, your Honor. William Fick  
for Mr. Peavy.

MR. TENNEN: Good morning, your Honor. Eric Tennen for all three defendants, I guess. I'm not sure what we're calling them.

THE COURT: All right, so at this point you've turned over all your documents?

MR. QUINLIVAN: Yes. We've turned over all the documents with respect to Mr. Shields and Mr. Peavy, and today we're going to be turning over all of the documents for the other seven, including Mr. Wetmore.

THE COURT: For the other?

1                   MR. QUINLIVAN: In the other seven cases, we're  
2 going to be getting them the materials in all of the other  
3 seven cases, including Mr. Wetmore. We focused initially on  
4 getting the materials for Mr. Peavy and Mr. Shields.

5                   THE COURT: But they're going to trial?

6                   MR. QUINLIVAN: Yes.

7                   THE COURT: And what are the grounds for holding  
8 them? Is it based on prior convictions, or is it based on  
9 just prior charges, allegations?

10                  MR. FICK: Those two individuals, Mr. Peavy and  
11 Mr. Wetmore, have prior convictions, and so the fact of a  
12 predicate is not in dispute. There may be a dispute about  
13 to what extent certain evidence like police reports come in  
14 as to conduct, but --

15                  THE COURT: This is exactly my question, so what  
16 was the prior conviction for Shields?

17                  MR. QUINLIVAN: Your Honor, in our view, he has  
18 two that would qualify as the pretext. In 1990 he was  
19 convicted of two counts of unlawful sexual contact in Maine.  
20 On October 30, 1998, he was convicted of unlawful sexual  
21 contact, also in Maine.

22                  THE COURT: So what does that mean, "contact"?

23                  MR. QUINLIVAN: In both cases, it was a touching  
24 of a young boy.

25                  THE COURT: And what does that mean? Like, in

1 other words, I'm just trying to -- when we talk about --  
2 like in that priest case where somebody touched the butt, or  
3 are we talking about a rape?

4 MR. QUINLIVAN: They were not -- well --

5 MS. KELLEY: I think the statute in Maine that he  
6 was convicted under is equivalent to an indecent A and B in  
7 Massachusetts.

8 THE COURT: So would you just be resting on that  
9 for the part one step?

10 MR. QUINLIVAN: Yes. We are obtaining certified  
11 copies of those --

12 THE COURT: So would the trial only look like a --  
13 basically what the psychiatrists think that means?

14 MR. QUINLIVAN: Yes. That's from our perspective.  
15 With respect to these two, you know, we don't anticipate and  
16 aren't intending factual testimony. We're intending to just  
17 offer those convictions.

18 THE COURT: Are there any statements from  
19 Mr. Shields to psychiatrists or anything like that?

20 MR. QUINLIVAN: There is with Mr. Peavy, not with  
21 Mr. Shields.

22 THE COURT: Shields is the first one, is that  
23 right?

24 MR. QUINLIVAN: Yes.

25 THE COURT: So I'm trying to figure out, so for

1 the very first trial, I will not have the issue of  
2 statements, right? I will not have the -- is that right, I  
3 will not have the issue of statements of psychiatrists?

4 MS. KELLEY: We have just received quite a stack  
5 of his counseling records from the BOP. I'm not certain  
6 until I go through them carefully, because some of them I  
7 have not seen before, whether we would even want to exclude  
8 those or not. And one of the things we would like to ask  
9 your Honor this morning, the defendants, is to give us a  
10 chance to review exactly what we've received from the  
11 government. I have a stack about like this that we got the  
12 day before yesterday, so I've started to go through it. A  
13 lot of it is handwritten notes, and it's a little bit tricky  
14 to decipher. But if we could just review what we've been  
15 given, have a couple days to talk to the government about  
16 whether we want additional materials and which of those  
17 materials we would want to keep, number one, experts who are  
18 going to be testifying from reviewing, because we may argue  
19 that some of that should not be seen by the experts, and/or  
20 just keep it out at trial.

21 THE COURT: Was there a signed waiver?

22 MS. KELLEY: Well, that's a whole question whether  
23 there was a waiver and what the waiver was for.

24 THE COURT: Was there a signed waiver?

25 MR. QUINLIVAN: There was a signed waiver in both

1 cases, yes.

2 MR. FICK: Well, I think the question is a signed  
3 waiver for what? There was a statement -- when the whole  
4 Adam Walsh commitment process began, the defendants signed a  
5 statement saying, "I understand I am being evaluated." We  
6 would argue that that's a long way from informed consent.  
7 There may also be old records of interviews or counseling  
8 with these people where we don't know yet whether there's  
9 consent or not because we haven't gone through the records.

10 THE COURT: Well, I guess I'm just trying to  
11 figure out. I had anticipated an advisory jury trial if  
12 there were a question about the facts of the prior  
13 conviction -- not the conviction -- the prior sexual  
14 offense. It sounds as if I don't need to do that.

15 MR. FICK: Well, whether there is a conviction as  
16 a predicate I think in these cases, it is clear you don't  
17 have to do that. But where it becomes tricky is  
18 potentially, though, to the extent the experts placed  
19 importance on the actual nature of the conduct underlying  
20 the conviction, then we may get into disputes about, well,  
21 do you admit the police report? Do you need live witnesses?  
22 If there were a federal sentencing, of course, Shepard would  
23 preclude the Court from looking at those things other than  
24 the fact of conviction. Here, though, the experts may well  
25 think, "Well, we really need to know what happened." So

1 until we dig down a little bit deeper to that level --

2 THE COURT: It's not a sentencing, so I don't know  
3 which way that cuts. When it's a hearing, I don't know if  
4 the Rules of Evidence apply even. What happens in state  
5 court? The Rules of Evidence apply, right?

6 MR. TENNEN: It essentially all comes out through  
7 case law, and they've created case law rules about what  
8 comes in and what doesn't come in. A lot more does come in  
9 in state court than in a regular case, but --

10 THE COURT: And a lot comes in through an expert  
11 who can rely on what an expert will rely on.

12 MR. TENNEN: It does.

13 THE COURT: So it sounds as if, if it's just about  
14 whether or not they're likely to be dangerous in the future,  
15 the prospective piece of it, if you will, I don't know if  
16 I'll have an advisory jury trial. What I was hoping, to  
17 have an advisory jury trial if there was no prior  
18 conviction. I have to think about that.

19 MR. TENNEN: Can I also just add, in state court,  
20 at least the statute is a lot clearer about what records  
21 they do allow in, and that's normally what the courts play  
22 off of. So they say the statute has a list of, you know,  
23 "shall be admissible," whatever it is, police reports,  
24 treatment records, et cetera; and that's where they obviate  
25 the need for witness testimony because the statute is very

1 explicit in what records can come in in lieu of testimony,  
2 and that's the fault we have here.

3 THE COURT: Does it say in the statute whether the  
4 Rules of Evidence apply?

5 MR. QUINLIVAN: I don't believe it says that in  
6 the statute.

7 THE COURT: One way or another?

8 MR. QUINLIVAN: I don't believe it does, that's  
9 right.

10 THE COURT: Do you know whether any court has  
11 addressed that issue in the context of any of these state  
12 statutes if it's not in the statute itself?

13 MR. TENNEN: I'm sorry? If it's not -- well, in  
14 the Rules of Civil Procedure, actually in state and federal,  
15 I don't know which one it is, but towards the end, 81 or  
16 something along those lines, there's a list of, "In the  
17 following cases, the Rules of Civil Procedure do not apply,"  
18 and there's a laundry list.

19 THE COURT: Evidence? The Rules of Evidence?

20 MR. TENNEN: Oh, evidence. I'm sorry. Well, no,  
21 again, in state court they just -- it's all based on what  
22 the statute explicitly says, and the courts will fill in the  
23 blanks.

24 THE COURT: It's an interesting area. Do you know  
25 whether --

1 MR. FARQUHAR: No, your Honor, but I will --

2 THE COURT: -- I should treat this in the  
3 commitment hearings under 4246, is that it? Do you know  
4 whether --

5 MR. QUINLIVAN: In the hearings that at least I've  
6 done, that issue has not come up. I mean, it's usually just  
7 been -- the court has heard testimony from a court-appointed  
8 expert, but I don't recall that specific issue yet coming  
9 up.

10 MR. FARQUHAR: And if I might add too, your Honor,  
11 particularly in those cases, the court-appointed expert can  
12 also instruct the court on what items that expert relied  
13 upon. And I think where we're getting a bit muddled up here  
14 is, if the expert relies upon information that goes back to  
15 the conviction, then certainly this Court can hear  
16 testimony, it would be our opinion, on what that expert  
17 relied upon.

18 Now, my brothers and sisters here are basically  
19 stating that, well, if they relied upon, let's say, a police  
20 report or something from the underlying conviction, that's  
21 something that we actually have to prove here first before  
22 that can be shown that it's something that can be relied  
23 upon. We would say "no." If you're asking for what will  
24 this person potentially do in the future, what did you look  
25 at in the person's past and over the time period the person

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1 was incarcerated with the BOP that would lead you to believe  
2 that?

3 THE COURT: Well, it sounds like you're right,  
4 experts do that. On the other hand, they can impeach the  
5 credibility of the expert if in fact they prove it didn't  
6 actually happen.

7 MR. FARQUHAR: That's correct, that's correct.

8 THE COURT: For example, take your touching case.  
9 Let's suppose it said he did all sorts of disgusting  
10 touching, but in fact it turns out all he pled was to a  
11 touching on the butt. I mean, let me just -- I have no  
12 idea, you know. If the expert is relying on the grosser --  
13 I'm sure I'm not using terms of arts -- the more disgusting  
14 kinds of touching and saying dangerous in the future, and it  
15 turns out that factually all he did was touch a butt, which  
16 is still a crime, that may undercut the credibility of the  
17 expert's opinion. I'm thinking out loud, but the facts may  
18 be relevant.

19 MS. KELLEY: Well, for example, in Mr. Shields's  
20 case, which you're going to hear shortly, I think, if we  
21 keep this date, which I hope we do --

22 THE COURT: Well, we will.

23 MS. KELLEY: In Mr. Shields case, one of his  
24 convictions was for touching an underage boy -- I believe he  
25 was a teenager, but he was underage -- in a bathroom. And

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1 one of the documents we have states that he touched the boy  
2 under his clothes, and Mr. Shields's contention is it was  
3 over the clothes. Now, whether that would have a big impact  
4 on the expert's opinion of his future dangerousness or not,  
5 I don't know.

6 THE COURT: That's a better example than mine  
7 because it's right from the facts. I don't know either.

8 MS. KELLEY: Right.

9 THE COURT: And they're both crimes.

10 MR. FARQUHAR: Correct. I mean, depending upon  
11 where the touching might be, quite frankly, and you would  
12 have to then, of course, find out from the expert, what did  
13 the person in their time at the BOP exhibit as to why you  
14 thought this person would be a continuing threat?

15 THE COURT: What do you all think about the use --  
16 I was quite sure I was going to use an advisory jury, quite  
17 sure, if there were no prior convictions as to the  
18 underlying fact of the crime. I wasn't sure that I was  
19 required to do it or I would do it as a matter of  
20 discretion, but now I'm looking on the second piece which is  
21 prospective. Do either of you want a jury?

22 MR. FICK: On a case-by-case basis, I think we  
23 would like to leave the possibility open. I mean, in the  
24 state system, the jury, as I understand it, is there  
25 precisely for the purpose of assessing the testimony about

1 future dangerousness, and so I don't know that you'd want  
2 the --

3 THE COURT: Do you want one? You both need to  
4 think about that.

5 MR. FICK: Well, and part of that is, we've got to  
6 review these records and see what they say and think about  
7 whether we want a jury in the individual case, but I think  
8 the possibility is something that we would like to keep in  
9 place.

10 THE COURT: The irony is, a lot of times it's the  
11 one area where defense counsel waive the right to jury, at  
12 least on the criminal side, in the state courts. So I don't  
13 know what you would want, and that would help guide me, if  
14 you both wanted an advisory jury.

15 MR. FICK: Certainly, your Honor, before the  
16 hearing, I expect we would file something with the Court  
17 expressing our preference explicitly and saying why, is what  
18 I would suspect.

19 THE COURT: So we need at this point a full  
20 pretrial order. I'm going to treat it -- it says  
21 "hearing" -- like a trial, right?

22 MR. FICK: It is essentially a trial, I agree.

23 THE COURT: It's essentially a trial, right?

24 MS. KELLEY: Yes.

25 THE COURT: I don't know if the Rules of Evidence

1 apply. We should probably take a look at that.

2 MR. TENNEN: Just to add on that point, there are  
3 certainly constitutional limitations to certain types of  
4 evidence coming in that would be at play, just general due  
5 process considerations that come into play on all levels of  
6 trials and hearings less than, you know, a probation  
7 hearing, for example, or something along those lines. I  
8 mean, there's certainly some limitations that have to apply,  
9 just constitutionally, whatever other rules we put in place  
10 to limit it.

11 THE COURT: Well, hearsay is typically  
12 allowed without due process violations but only if it's  
13 reliable.

14 MR. TENNEN: Exactly. I mean, there's certain  
15 types of hearsay.

16 THE COURT: I'd have to think long and hard, for  
17 example, before I let you subpoena that little boy in, you  
18 know. I don't know how far to go on that stuff. I don't  
19 know. But what about the charging police officer who  
20 interviewed the boy, and then the question is, on the fresh  
21 complaint, would we allow the police officer to testify  
22 about the fresh complaint? And I don't know whether this  
23 looks like retrying that or not.

24 MS. KELLEY: I don't foresee that kind of detail  
25 or bringing in those kinds of witnesses, your Honor. In

1 Mr. Shields's case, we have two guilty pleas. He didn't  
2 have jury trials. So even under Shepard, I think it would  
3 be -- you know, one reliable document would be a transcript  
4 of the guilty plea, if you're interested in the underlying  
5 facts and what precisely did he plead guilty to. So --

6 THE COURT: All right, so why don't we do this.

7 At this point we know more than we did last time but not a  
8 lot more, so I'm open to an advisory jury. Before, as I  
9 said, if it was going to be a factual predicate, I was going  
10 to insist on it. I'm nowhere near as firm right now. So  
11 when do you think -- let's just go through -- this is  
12 essentially like an expedited civil case. Did we set all  
13 sorts of deadlines last time? I don't think we did. Is  
14 anyone anticipating any kind of civil discovery other this  
15 document exchange?

16 MS. KELLEY: We are. The government is making a  
17 proposal, I believe today, that the Court appoint another  
18 expert. We have just received the credentials of that  
19 person. They're a BOP employee, and we're going to --

20 THE COURT: So I appointed someone that you both  
21 agreed on, right?

22 MS. KELLEY: Yes.

23 THE COURT: Everyone agreed on?

24 MR. QUINLIVAN: Yes, and I was going to raise this  
25 issue. The expert who the government is going to be relying

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1 on, we're going to be asking the Court to allow him to  
2 conduct a psychological examination of the respondents. The  
3 statute allows more than one expert to be appointed. He is  
4 a BOP employee, but I can tell the Court that we're going  
5 to, you know --

6 THE COURT: Can't he decline, this guy Shields, I  
7 guess, at this point decline?

8 MR. QUINLIVAN: That's an issue that we've talked  
9 about. I mean, I think from our perspective, you know, I'm  
10 not sure they could selectively invoke their Fifth Amendment  
11 rights, you know, with respect to one examiner and not with  
12 respect to the Court-appointed.

13 THE COURT: So let me just take one step. So it's  
14 not a slam dunk that I'm going to do this if the follow on  
15 from that is -- I don't want to be putting them in jail for  
16 refusing to talk to your person. This is new to me. I've  
17 already appointed an independent examiner that both people  
18 agreed on. You agreed on, right?

19 MR. QUINLIVAN: We didn't oppose, that's right,  
20 but, I mean, we think that the statute allows for more than  
21 one psychological examination.

22 THE COURT: Maybe it does and maybe it doesn't,  
23 but I'm not here to waive his Fifth Amendment rights. I  
24 don't know. It's just pulling something that's new to me.

25 MR. QUINLIVAN: No, I understand, and I would say,

1 in the civil context, I mean, in the civil context, at most,  
2 my understanding with Fifth Amendment is, you know, an  
3 adverse inference is taken. I don't think there would be  
4 any issue about, you know, incarcerating him. But, you  
5 know, this is something we've preliminarily talked about.  
6 We do intend to file a request with your Honor. At bottom,  
7 you know, we think, you know, your Honor should have as much  
8 information as possible in making this determination.

9 THE COURT: Well, is this the BOP person who  
10 initially was the basis of the certification?

11 MR. QUINLIVAN: No, it's not. It's a --

12 THE COURT: Can't that person -- I assume you had  
13 a psychiatrist make that determination.

14 MR. QUINLIVAN: No, we did, but --

15 THE COURT: So let him testify in the government's  
16 corner. He's already examined him, right?

17 MR. QUINLIVAN: No, we absolutely could, your  
18 Honor. And to a certain extent we're taking the risk  
19 because this person has not yet examined the respondents and  
20 might not come to the same conclusion. So we're willing to  
21 take --

22 THE COURT: Where does this end with you? Let's  
23 suppose I appoint them -- maybe you're right that you can  
24 appoint two -- and he declines to be interviewed? Then  
25 what?

1                   MR. QUINLIVAN: Well, I think, from our  
2 perspective, I mean, he could decline to be interviewed, but  
3 I think he would -- I'm not sure he could decline to be  
4 interviewed by one but be interviewed by others.

5                   THE COURT: So then you would come to me with an  
6 order, right?

7                   MR. QUINLIVAN: Yes, presumably.

8                   THE COURT: And I end up putting him in jail for  
9 contempt? It just ends up being an ugly scene.

10                  MR. QUINLIVAN: I understand, your Honor, and I  
11 don't think we would be asking your Honor -- in the civil  
12 context, when Fifth Amendment rights are invoked,  
13 ordinarily, you know, unless there's some kind of user, you  
14 know, order, ordinarily all the government does is say that  
15 an adverse inference can be taken. It doesn't -- we're  
16 certainly not asking that they be incarcerated. In any  
17 event, I mean, they --

18                  THE COURT: They may well have a Fifth Amendment  
19 privilege if it's material beyond which the independent, the  
20 neutral, the independent person, right?

21                  MR. FICK: I guess, your Honor, several issues.  
22 The first is, I'm not sure there's really any basis, quite  
23 apart from the Fifth Amendment, to require any of the  
24 respondents to participate in an evaluation process; and  
25 certainly an evaluation can be done based on the records,

1 which is really the basis of a lot of these actuarial  
2 instruments that are used, in any event, for determinations  
3 of dangerousness.

4 THE COURT: What happens in the state courts when  
5 an independent person is appointed?

6 MR. TENNEN: Well, again, the statutes are very  
7 clear what happens there, and in the petitions for a  
8 commitment, these initial petitions, essentially the person  
9 has the choice whether to talk or not, and there's no  
10 penalty one way or the other. It's just uniform amongst all  
11 the doctors. And in the petitions coming out, once you're  
12 being committed and you're trying to be released, the  
13 statute itself is very clear that you have to talk, you  
14 know, unless there's good cause not to. So it's governed by  
15 the statutes, and it's pretty much uniform among all the  
16 persons who are doing the evaluation.

17 THE COURT: Let me ask you because the flip side  
18 hurts you too. Suppose this neutral guy says, "Yeah, he's  
19 dangerous"?

20 MR. TENNEN: Well, and that's also, I mean --

21 THE COURT: So if you get to put on an expert --

22 MR. TENNEN: I mean, I am sure at that point we'd  
23 be seeking and even now at this point are talking about  
24 seeking our own independent person that we can talk to  
25 outside of the court context. I mean, the assumption is --

1                   THE COURT: The government could do that too. I  
2 mean, you can't say one thing and then --

3                   MR. TENNEN: I think it's all or none, to be  
4 perfectly honest, either --

5                   MR. FICK: Well, the government, your Honor, could  
6 certainly do it, but the question is, you know, does the  
7 respondent have to talk to the government's person? And I  
8 think the statute here is clear that the Court certainly can  
9 appoint more than one person, but it's all framed in terms  
10 of the Court can appoint an evaluator for the Court. The  
11 defense can request another one. There's certainly no  
12 provision for the government to ask the Court to appoint an  
13 employee of the government, of the very institution that's  
14 seeking certification, as another expert. Certainly the  
15 government can have their expert look at the records, look  
16 at what the other evaluators say the respondents said, but  
17 I'm not sure our clients have to talk to the government's  
18 expert.

19                   THE COURT: Suppose they wanted another expert  
20 outside the Bureau of Prisons, would you have the objection?

21                   MS. KELLEY: I would still object at this stage.  
22 I mean, first of all, I know it's through no fault of their  
23 own, but the government gave us this discovery late. We're  
24 bumping up against all kinds of deadlines now.

25                   THE COURT: That's why I'm doing this now. Let me

1 do this --

2 MS. KELLEY: We would need to depose the person.

3 I'm just really concerned about the time frame here.

4 MR. TENNEN: Can I add one more thing about the  
5 state scheme?

6 THE COURT: I don't know what I'm going to do, let  
7 me just say this, but I do know one thing, which is, I'm not  
8 getting into this whole thing. If he declines to testify on  
9 the grounds of the Fifth, the best you get is an adverse  
10 inference. I'm not going to hold a contempt proceeding and  
11 order him to. If he takes the Fifth, and then you're going  
12 to say, well, he waived it with one rather than the other, I  
13 think that's a really unseemly place for this to be right  
14 now. I think you can have your own expert, and you can have  
15 your own expert, but I don't know why I should appoint more  
16 than one, period. I don't know why at this point. Maybe in  
17 another case I will. This is a fairly simple one, two prior  
18 convictions, right? It doesn't sound -- I don't know enough  
19 about him. Did he say something to the psychiatrist that "I  
20 can't stop touching"?

21 MS. KELLEY: No. In fact, quite the opposite. He  
22 went through counseling at Butner. He had a very successful  
23 treatment there. We may well call the woman who treated him  
24 at Butner for counseling. He did not enter sex offender  
25 treatment, but he was in individual therapy, very intense

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1 therapy with a therapist there at Butner for years. You  
2 know, one of his convictions obviously is seventeen years  
3 old.

4 THE COURT: What was he found guilty of?

5 MS. KELLEY: He was in jail for child pornography,  
6 not a touching, so --

7 THE COURT: Isn't there some study that shows  
8 connections?

9 MR. TENNEN: No.

10 MS. KELLEY: That study is so flawed, it was not  
11 able to be published.

12 MR. FICK: The BOP actually withdrew the study. I  
13 mean, it was sort of floated out there, talked about, and  
14 then the BOP formally withdrew it. We may actually be  
15 seeking some discovery about that to the extent it may come  
16 up.

17 THE COURT: Actually, it was vetted in some  
18 majority judge's conference. It's interesting. I don't  
19 know much about it other than I knew it was controversial.

20 Let me say this: I don't know if I'm going to.  
21 At this point this seems pretty straight -- there are lots  
22 of things I don't know, but let's set deadlines. You're  
23 going to file your motion today. You'll file an opposition  
24 within a week, right?

25 MS. KELLEY: Yes.

1                   THE COURT: Okay. When is our trial date,  
2 November what? Let's work backwards.

3                   MS. KELLEY: It's the week after Thanksgiving.

4                   THE COURT: I don't want to be doing motions  
5 in limine over Thanksgiving weekend, so, ideally speaking,  
6 we will have resolved them by then. So if in fact the 26th  
7 is the day of trial, what if we -- and I know we're coming  
8 up against it, but what if we said that all motions  
9 in limine would be filed with respect to all these issues on  
10 November 5? And then the opposition on the 12th, then we  
11 hold a hearing on the week of the 12th, and ideally I'll  
12 rule before you walk into trial.

13                  MR. FICK: As a practical matter, we might need to  
14 really do this even earlier because part of the issue is  
15 going to be, if something we believe needs to be excluded,  
16 we're not going to want the expert to see it, and so it's  
17 going to have to be a quick turnaround, I think, where we  
18 either agree --

19                  THE COURT: I'm not preventing you from doing it  
20 earlier, this is just the drop-dead date kind of thing,  
21 because right now it's October 18. As you point out, it's  
22 not a whole lot of time here. So my theory is -- when is  
23 the expert going to meet with him?

24                  MR. TENNEN: That's part of the problem he's going  
25 to face. Normally they like to look at the records before

1 going out and talk to the person. He needs to get a sense  
2 of the background.

3 THE COURT: He should be able to look at  
4 everything that the Bureau of Prisons looked at.

5 MR. TENNEN: This is the conflict. There are some  
6 things that we believe --

7 THE COURT: Like what?

8 MR. FICK: Well, to the extent there was an  
9 evaluation of these guys for the Adam Walsh Act where they  
10 were presented with this piece of paper saying, "You're  
11 going to be evaluated, sign this," and then they talked, we  
12 may well take the position that that was not voluntary  
13 consent.

14 THE COURT: Can I just say something? You're the  
15 one pushing this early trial date, and I understand why. I  
16 mean, it took forever to brief this thing. The briefing was  
17 fabulous, but it took six months, whatever it took, and, you  
18 know, we're working on it as we speak. But you can't have  
19 it both ways. At some point I'm not going to be an ATM  
20 machine. This is all brand-new turf. You need to be able  
21 to get it in in a way that there's at least a week's  
22 opposition period, and then at least a week for me to rule,  
23 and then enough time for the experts. I mean, we're there,  
24 we're right up against it right now. Somebody asked for  
25 another deferring on the hearing. I can't do that. Really,

Page 25

1 we've got a month. That's huge if you want this November  
2 date.

3 MS. KELLEY: Well, can I make a suggestion, which  
4 is that may we see the Court next Friday, the 26th? And  
5 that way, if we don't need to see the Court, we can notify  
6 Mr. Alba, but --

7 THE COURT: But seeing me isn't going to help  
8 because it's just like some of these issues, I'm spewing off  
9 the top of my head: Do we need Rules of Evidence? What  
10 about an advisory jury? What about waiver? I won't give  
11 you an answer. It won't be thoughtful. I need something in  
12 writing, a point/counterpoint, just the way we always do  
13 things. And you're all just so excellent. The briefing, as  
14 I said, was fabulous, and it helps me. I won't give you a  
15 good answer. I'll be sitting here just sort of talking off  
16 the top of my head: Oh, I can't remember if the Rules of  
17 Evidence apply to a civil commitment proceeding, right?

18 So you tell me when you can get a motion. What  
19 I'm saying is on the drop-dead date, any motions in limine  
20 should be filed on November 5, any opposition by the 12th.  
21 When can we have a hearing in the afternoon of that week  
22 following the 12th, Robert?

23 THE CLERK: That would be the 16th at 4:00.

24 THE COURT: No.

25 (Discussion off the record.)

1                   THE COURT: How about 3:00 o'clock on the 16th?

2                   MR. FARQUHAR: That's fine, your Honor.

3                   THE COURT: So we'll have a hearing on at least  
4 any motions in limine that are filed. But here's the thing.

5 Now, any position that you have on advisory jury trial I'm  
6 going to need to let the jury commissioner know. I'm torn.  
7 I think in the state court system, it adds a certain degree  
8 of legitimacy, both for the defendant and the public,  
9 whatever happens. If the person is let go, a jury has said  
10 it; if the person is held, a jury has said it. It adds a  
11 certain degree of legitimacy. On the other hand, I don't  
12 think it's constitutionally required, and sometimes defense  
13 don't want it and sometimes they do, and sometimes  
14 prosecutors want it. It just depends, I suppose.

15                  MS. KELLEY: Well, your Honor, if we could just  
16 have a few days to look at the discovery. My impression is,  
17 for Mr. Shields, we would be asking the Court for an  
18 advisory jury, and I'll file something relatively soon on  
19 that point. I just think it's totally up to the Court's  
20 discretion. Under Rules of Civil Procedure, you can do it  
21 if you want to, and it's just a question, do you want --

22                  THE COURT: Well, I knew I was going to do it if  
23 there wasn't a prior conviction, and now I've got to think  
24 about it. But I must say, for the reasons I just said,  
25 especially for the first trial out of the box here, it

1 wouldn't be such a terrible thing to have a jury speak its  
2 mind; and then of course, because it's ultimately my say, I  
3 would have to decide what weight to give to that. But,  
4 anyway, I'd be willing to do it for sure if you both agreed.  
5 If you disagreed, I'll think about it. I just think that it  
6 is a culture of Massachusetts that we have juries do this,  
7 and that means something; you know, why should you get a  
8 jury on the stateside and not the federal side? I'm  
9 thinking out loud, but I'm inclined to do it if you all want  
10 it; and if there's a disagreement, let's just vet it by that  
11 timetable.

12 Now, on the waiver point, that's got to move a lot  
13 faster.

14 MR. FICK: I think, your Honor, if we have a  
15 disagreement with the government about that, we would try to  
16 file something next week, in the first part of next week to  
17 put that issue in play. The government can oppose it, and  
18 then you can either set a hearing or decide on the papers.

19 THE COURT: Have you looked at it?

20 MR. QUINLIVAN: Yes. There was sort of a standard  
21 form that both Mr. Shields and Mr. Peavy signed.

22 THE COURT: And what does it say?

23 MR. QUINLIVAN: Paraphrasing, it basically says  
24 that "For purposes of the interview, one of the things that  
25 could result is a determination that you're a sexually

1 dangerous person under the --" I don't know if it says the  
2 Adam Walsh Act.

3 THE COURT: And does it say "and you could be  
4 held"?

5 MR. FICK: It does, your Honor, but the problem  
6 with it is, it just says, "We are going to do this. Sign  
7 this to say you understand we are going to do this." It  
8 doesn't give the defendant any choice about, you know, "You  
9 don't have to talk to us. You can ask for a lawyer." It  
10 says nothing -- it doesn't require any kind of consent. It  
11 just says, "I understand you're going to do this." And from  
12 our point of view, that's problematic.

13 THE COURT: It doesn't say "waiver"?

14 MR. FICK: No.

15 THE COURT: Is that right?

16 MR. FICK: It's a notice of psychological  
17 evaluation or something like that is the way it's styled.

18 THE COURT: So it's not clear they had a choice.

19 MS. KELLEY: Well, I think on Mr. Shields's behalf  
20 too, I need to look more closely at what the body of records  
21 is and what we're wishing to keep out, if anything, and then  
22 I think we will all file something next week, because  
23 especially if we don't want the evaluator to see certain  
24 records, which happens in state court quite frequently, the  
25 evaluator is given certain materials and not given other

1 inadmissible things, so --

2 THE COURT: What happens in state court with  
3 respect to the waiver? Is it not an issue?

4 MR. TENNEN: Well, again, it's a little different,  
5 and it's all governed by statute. It depends if you're  
6 going in or coming out. In terms of whether you have to  
7 talk to the experts, is that your question?

8 MS. KELLEY: The records.

9 MR. TENNEN: Oh, the records? Both of those  
10 issues, whether you have to talk or not and what records are  
11 admissible, all in the statute. So if you're --

12 THE COURT: What does the statute say? Do you  
13 have to talk?

14 MR. TENNEN: Again, if the Commonwealth is trying  
15 to petition for your civil commitment, you do not. It's up  
16 to you essentially. If you are petitioning for release, you  
17 do unless there's good cause, so --

18 THE COURT: It shifts.

19 MR. TENNEN: It does. Essentially they can't  
20 force you to talk when they're trying to put you in, but  
21 when you're coming out, I guess they think they can. In  
22 terms of the records, it's the same thing. The records that  
23 come in --

24 THE COURT: Suppose I say there wasn't a valid  
25 waiver because it doesn't give them a choice, what then

1 happens?

2 MR. FICK: Well, I think we would seek then to  
3 redact any information going to the independent expert that  
4 reflects statements made by the respondents in these Adam  
5 Walsh evaluations.

6 MR. QUINLIVAN: I think that -- I mean, obviously  
7 we're going to be opposing, but I think that's probably  
8 right. I don't think it would call into question the  
9 certifications themselves. I think the question then would  
10 be what information would have to be redacted.

11 THE COURT: So this is called a notice, not a  
12 waiver?

13 MR. QUINLIVAN: Just off the top of my head, I  
14 don't remember the title of it. I don't know if the word  
15 "waiver" is in there. It's almost a page-long document.

16 THE COURT: Does it say like a Miranda right, "You  
17 have the right not to --"

18 MR. QUINLIVAN: No, it does not say that, but it's  
19 more in the terms --

20 THE COURT: Do you think you have a right not to?

21 MR. QUINLIVAN: To? I'm sorry?

22 THE COURT: Do you think you have a right not to  
23 talk to the psychiatrist?

24 MR. QUINLIVAN: I think anyone, certainly, I mean,  
25 I think that they have the right not to. I think the only

1 question becomes whether they have the right to selectively  
2 invoke the Fifth Amendment privilege with respect to one  
3 examiner versus another.

4 Again, to the extent one or both respondents do  
5 that, all we would -- at most, what we would be saying is an  
6 adverse inference would be taken. But, you know, I guess  
7 that's -- you know, I haven't looked at this closely, but my  
8 sense is that, you know, everyone has the right to invoke  
9 their Fifth Amendment rights in an appropriate context. The  
10 only question becomes whether or not you can do it  
11 selectively.

12 MR. FICK: I think your Honor in some ways is  
13 beginning to mix two questions because the question of  
14 whether statements made while still inside the BOP prior to  
15 certification were proper versus whether they have to talk  
16 to one, two, or three experts now, I think those are  
17 distinguishable questions.

18 MS. KELLEY: I had one other matter I wanted to  
19 raise with the Court.

20 THE COURT: And you think I'm going to resolve all  
21 this by the November 26 date? That's daunting.

22 MS. KELLEY: I plan to file today or tomorrow a  
23 motion to dismiss Mr. Shields's case entirely because as I  
24 was just looking at the BOP computation sheets, it seems to  
25 me that the government filed his certification one day after

1 I think he should have been released from custody. You  
2 know, the statute says "A person in the custody of the BOP  
3 may be certified." So one of the issues for all of us is,  
4 was our client's sentences calculated properly? And I  
5 think --

6 THE COURT: There's no way I'm going to resolve  
7 that all by November 26. It's not going to happen. It may  
8 be a valid post-hearing decision. It's just not going to  
9 happen. My big issue immediately is to have this expert  
10 interview him.

11 MS. KELLEY: Okay.

12 THE COURT: And if you take the most extreme  
13 position, you're saying that they're not allowed to look at  
14 anything post the Adam Walsh Act?

15 MR. FICK: No. I think, your Honor, the question  
16 is, can they look at purported statements of the respondent  
17 made to BOP personnel in the process of being evaluated? So  
18 if we decide we have to disagree about that issue, we will  
19 file something with the Court; and if the Court were to rule  
20 that it needs to be excluded, it would be a relatively  
21 simple process, I think, of redaction.

22 THE COURT: Why wouldn't everything come in?  
23 Wouldn't everything after the notice -- if you say it was an  
24 invalid waiver, everything he said after that -- I mean, I  
25 wouldn't pick and choose.

1                   MR. TENNEN: Perhaps the confusion is, there  
2 aren't that many documents generated other than the  
3 interview that he had with the BOP personnel in preparation  
4 for the certification.

5                   THE COURT: I see, but there's a whole range of  
6 discussions prior? Is that right?

7                   MR. FICK: Potentially, yes. Certain of the  
8 clients were in counseling, perhaps for even years before.  
9 There may be a separate issue about that.

10                  THE COURT: I see, so this is just like the tail  
11 end of it?

12                  MR. TENNEN: It's a relatively small part of the  
13 records. I think largely we agree on most of the records.

14                  THE COURT: Thank you. That's very helpful. I  
15 had this image -- because at some point do they sign a  
16 general waiver when they talk to the psychiatrist at Butner  
17 for all these years?

18                  MS. KELLEY: Well, let's take Mr. Wetmore whose  
19 case you will see eventually.

20                  THE COURT: That's your tough nut case.

21                  MS. KELLEY: Yes, ma'am, he is. He was in the sex  
22 offender treatment program down in Butner, and he signed a  
23 waiver that said, "I understand that the things I divulge in  
24 this treatment may be released to the BOP." So ostensibly  
25 you could say, okay, anything he says in treatment at Butner

1 we can use to certify him as a sexually dangerous person.

2 But when he signed that waiver, the Adam Walsh Act wasn't  
3 even in existence.

4 THE COURT: That's a harder case for you than when  
5 you know about it and you don't say that you don't have the  
6 right to talk. I mean, that comes up in all sorts of  
7 different contexts, that kind of an issue, but --

8 MS. KELLEY: Well, also --

9 THE COURT: Well, all the Guidelines and the  
10 enhancements and the this and the that. But, anyway, I  
11 think I hear the issue come up. I think we've got a time  
12 line. The key thing is, can you both think and take a  
13 position within a week on the jury issue?

14 MR. QUINLIVAN: Yes, absolutely.

15 THE COURT: What I would hope to do is maybe call  
16 up -- I'm told Ralph Gants, Diane Kottmyer, there are a  
17 bunch of judges in the state court that do a lot of this  
18 stuff, and get some jury instructions and adapt them for the  
19 federal side.

20 MR. TENNEN: We can certainly supply you with  
21 suggested jury instructions.

22 (Laughter.)

23 MS. KELLEY: But, your Honor, I am going to file  
24 this motion to dismiss which might negate the necessity for  
25 the whole proceeding.

1                   THE COURT: Yes, maybe. It's just I'll need an  
2 opposition period, and then I'll need to think about it, and  
3 just assume it's not right now.

4                   MS. KELLEY: Okay. Well --

5                   THE COURT: But maybe it's something that happens  
6 post, you know, like, I just worry about afterwards.

7                   MS. KELLEY: Okay.

8                   THE COURT: But even if I did, it just moves right  
9 into -- I'm going to just do Shields and then right into  
10 Peavy. So what's Peavy's background?

11                  MR. FICK: Well, he has a long history of various  
12 psychological problems and he's had a stroke, and so there's  
13 years and years and years of records with the guy. You  
14 know, but I think it's still, relatively speaking, a  
15 straightforward case. We'll have the doctor look at him,  
16 look at the records --

17                  THE COURT: What's his prior conviction? What's  
18 he in on?

19                  MR. FICK: Well, he was in for a touching of a  
20 nurse at VA facility for six months was the offense for  
21 which he was in federal custody. He has, though, dating  
22 back to the '70s a couple of very serious sexual assault  
23 convictions.

24                  MS. KELLEY: On adults.

25                  MR. FICK: On adults.

1                   MR. QUINLIVAN: Including he actually has a rape  
2 conviction as well, Mr. Peavy.

3                   THE COURT: How many rape convictions?

4                   MR. QUINLIVAN: He has a rape conviction from  
5 1978, and then sexual assault and/or contact convictions as  
6 well.

7                   THE COURT: All right, so I think, although I'm  
8 not setting absolute deadlines now -- there are two lawyers  
9 for the government and three for you -- we should be putting  
10 Peavy on a similar track.

11                  MR. FICK: Yes, your Honor. I mean, our hope was  
12 to really, whether Shields goes forward or not, was to do  
13 Peavy as soon as possible thereafter, and so, you know, if  
14 he can get bumped up --

15                  THE COURT: Suppose they missed it by a few days  
16 on Shields, what would your position be? I mean, what if  
17 it's clear, it's not one of these bean-counting things to  
18 figure out, what if they miss it by a day or two?

19                  MS. KELLEY: It's pretty straightforward actually.  
20 What happened was, they didn't credit him with the time from  
21 the date of his arrest for some reason, and we've finally  
22 been able to get the Penobscot County jail to verify. He  
23 wasn't arrested on the 20th of September, 2002; he was  
24 arrested on the 18th and was in custody for those two days.  
25 They certified him on their own records the day before he

1 was to be released, so they missed him by a day. He should  
2 have been released --

3 THE COURT: See, but this is the kind of thing  
4 that is not so simple because I don't know if he was  
5 arrested on a state warrant for a separate charge. I don't  
6 know. Just, you know, I've had this come up in my own  
7 sentencings, you know, do you get state time credit for  
8 these things? Well, it depends, he was picked up on a state  
9 charge; and then it's up to the judge often to figure out  
10 whether the state time gets credited to the federal. You  
11 need to go look this stuff up. You may end up being right.

12 MS. KELLEY: Well, he was given -- he was picked  
13 up on a state warrant, and he was given all the credit on  
14 state time for 375 days of credit, but it should have been  
15 377. That's our contention, so --

16 THE COURT: It doesn't sound simple, but you may  
17 be right.

18 MS. KELLEY: Okay.

19 MR. QUINLIVAN: I mean, I haven't seen the  
20 pleadings yet. I mean, Ms. Kelley has informed me about  
21 this, but we'll take a look and we'll respond. I haven't  
22 seen any of the particulars.

23 THE COURT: If it's clear-cut, like, let's say it  
24 was a true that they just made a mistake --

25 MR. QUINLIVAN: Well, I think your Honor is

1 exactly right, it's not -- I don't think it would even then  
2 be fair --

3 THE COURT: It does strike me as jurisdictional,  
4 right?

5 MR. QUINLIVAN: I don't know if it's  
6 jurisdictional. I don't know, you know, whether this is a  
7 collateral challenge to the BOP's determination. I don't  
8 know if it would be jurisdictional, and that's one of the  
9 things we'd respond in writing. I have to see their  
10 argument before --

11 THE COURT: But I don't know if it's  
12 jurisdictional if by accident they're still holding him, and  
13 they shouldn't have been holding him, as opposed to if he  
14 was released a day in supervised release, and then they said  
15 "whoops." I think then it's too late for you.

16 MR. QUINLIVAN: I think that might be the case.  
17 There is no question here he was absolutely in BOP custody  
18 when the certification was made, so the question -- so I  
19 don't think it's as simple as saying --

20 THE COURT: I don't think it's as simple either,  
21 okay, but I do think -- I mean, I was thinking about it  
22 because one of the guys when I was reading the North  
23 Carolina case, really interesting, he was on probation, and  
24 he got revoked for something, you know, like all the things  
25 that you get revoked for, and it was during the revocation

1 period that he got certified. So it's really interesting.

2 He was on nine months, I think, probation. I read some of  
3 the factual background. Anyway, I look forward to this.

4 Are we the first case in the nation that's  
5 actually going to go to trial?

6 MS. KELLEY: Yes.

7 THE COURT: So I can't call anyone else? Is there  
8 anybody else scheduled that I could --

9 MR. TENNEN: I think you're trailblazing, your  
10 Honor.

11 MS. KELLEY: No, there's no one else scheduled.  
12 It's just you. You're way out there.

13 THE COURT: That North Carolina judge is on  
14 appeal, right?

15 MR. FICK: Yes.

16 THE COURT: And what about Judge Tauro? He's  
17 usually faster than I am.

18 MS. KELLEY: No.

19 THE COURT: No, all right.

20 THE CLERK: Court is in recess.

21 (Adjourned, 9:55 a.m.)

22

23

24

25

1 C E R T I F I C A T E

2

3 UNITED STATES DISTRICT COURT )  
4 DISTRICT OF MASSACHUSETTS ) ss.  
5 CITY OF BOSTON )  
6

7 I, Lee A. Marzilli, Official Court Reporter, do  
8 hereby certify that the foregoing transcript, Pages 1  
9 through 39 inclusive, was recorded by me stenographically at  
10 the time and place aforesaid in MC No. 06-10427, United States  
11 of America V. Jeffrey Shields, and thereafter by me reduced  
12 to typewriting and is a true and accurate record of the  
13 proceedings.

14 In witness whereof I have hereunto set my hand  
15 this 15th day of May, 2009.

16  
17  
18  
19  
20 /s/ Lee A. Marzilli  
21

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22 LEE A. MARZILLI, RPR, CRR  
23 OFFICIAL COURT REPORTER  
24  
25